BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KATHLEEN K. KORNMESSER	)	
Claimant	)	
VS.	)	
	)	
STATE OF KANSAS	)	Docket No. 1,057,774
Respondent	)	
AND	)	
	)	
STATE SELF INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Claimant requests review of Administrative Law Judge William G. Belden's April 30, 2013 preliminary hearing Order. Daniel L. Doyle of Kansas City, Missouri, appeared for claimant. Nathan D. Burghart of Lawrence, Kansas, appeared for respondent and its insurance carrier (respondent).

Claimant had a left knee injury. Respondent provided treatment for claimant's medial and lateral meniscus tears for which she reached maximum medical improvement. Claimant sought additional treatment for left knee arthritis and an ACL deficiency. Judge Belden ruled claimant's work-related accident was not the prevailing factor in these additional conditions, and he denied claimant's requests for additional medical treatment, temporary total disability benefits and attorney fees.

The record on appeal is the same as that considered by the administrative law judge and consists of the May 24, 2012 preliminary hearing transcript, Dr. Samuelson's report dated September 25, 2012, the transcript of Dr. Hopkins' deposition taken April 8, 2013 and exhibits thereto, and the transcript of the April 24, 2013 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Claimant requests the Board reverse Judge Belden's Order. She argues her accident was the prevailing factor in her need for additional medical treatment. Claimant asserts the Board has jurisdiction based on "whether certain defenses apply." Respondent asserts the Board lacks jurisdiction to review Judge Belden's Order. If jurisdiction is appropriate, respondent argues Judge Belden's Order should be affirmed.

The issues for the Board's review are: (1) does the Board have jurisdiction to hear claimant's appeal and (2) is claimant entitled to additional medical treatment?

FINDINGS OF FACT

Claimant began working for respondent in June of 2011 as a corrections officer at Lansing Correctional Facility. On August 20, 2011, claimant was running in response to an alarm when she stepped in a hole and fell, striking her left knee on the ground. She suffered scrapes to her right elbow and left cheek, but her primary injury involved her left knee. She got up and walked the rest of the way, as she was unable to run.

Claimant was provided authorized medical care and she was referred to Lowry Jones, M.D., an orthopedic surgeon. Dr. Jones' left knee diagnoses for claimant included a lateral meniscus tear, medial meniscus tear, grade IV tricompartmental arthritis, and large osteophytes. On November 18, 2011, Dr. Jones performed left knee arthroscopic partial lateral and medial meniscectomies and tricompartmental chrondroplasty and osteophyte removal. Claimant remained symptomatic.

Dr. Jones suggested viscosupplementation therapy on January 24, 2012. He noted:

> She has very significant pre-existing arthritis. Her injury resulted in meniscal tear which was treated appropriately with arthroscopic debridement. She has advanced tricompartmental arthritis which is pre-existing. We discussed further options for treatment including Orthovisc injections. I explained to her that this was for her arthritis which is pre-existing. I suggested that she proceed with her private insurance for Orthovisc.

On March 1, 2012, Dr. Jones indicated claimant reached maximum medical improvement. He released her to full duty without restrictions.

Claimant was seen at her attorney's request by William O. Hopkins, M.D., on May 17, 2012. Dr. Hopkins stated:

> I believe with a reasonable degree of medical certainty that the fall that [claimant] sustained on August 20, 2011 aggravated and accelerated the need for a left total knee replacement that may have not been a requirement had that injury not occurred. Therefore, again, with a reasonable amount of medical certainty I believe that [claimant] sustained new injuries to her left knee and that all of her problems are not related to her prior injuries.[1]

On May 24, 2012, Judge Howard ordered the parties to agree upon a specialist to evaluate claimant to determine if her accident was the prevailing factor in her need for medical treatment. The parties agreed to send claimant to Thomas S. Samuelson, M.D.

The claim was transferred to Judge Belden effective September 14, 2012.

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[1] Hopkins Depo., Ex. 1 at 8.

Claimant was seen by Dr. Samuelson on September 19, 2012. Dr. Samuelson's left knee diagnoses included degenerative joint disease, status post arthroscopic partial medial and lateral meniscectomy with chrondroplasty, and status post left anterior cruciate ligament reconstruction with subsequent ACL deficiency. Dr. Samuelson stated:

> [I]t is my opinion that her preexisting arthritic change in the knee is the reason for her persistent pain and discomfort in the left knee. The need for additional treatment is due to this underlying degenerative change and is not due to the work related accident that she sustained on August 20, 2011. The incident on that date did aggravate these underlying degenerative changes and may have caused some minimal meniscus pathology which has been appropriately treated by Dr. Jones.

Dr. Hopkins' deposition was taken on April 8, 2013. Dr. Hopkins testified claimant's need for a total knee replacement was a result of her work-related injury:

Q. . . . [w]hy does she need a total knee replacement?

A. I think it is because of the injury.

Q. Okay. Do you think the injury was the prevailing factor in her need for a total knee replacement?

A. Yes, I do. It changed immediately, caused an immediate profound loss of function in the knee. Basically her instability and additional meniscus surgery.[2]

He further testified on cross examination:

Q. How do you define the term "prevailing" as you use it in prevailing factor?

A. Prevailing factor, in my opinion, would be the incident that causes a specific change or a specific requirement for treatment.

Q. In your report of May 17 you gave the opinion that the work injury, "aggravated and accelerated" the need for the total knee. Is aggravating and accelerating the same thing, in your mind, as prevailing factor?

A. I think that the -- again, let me go back to some of my original statements. There are many arthritic changes or many arthritic joints that never need replacement. So the fact that it is there does not mean that it requires treatment. And so this lady obviously was functional with preexisting arthritic changes in her knee, but that changed with this specific injury where she

[2] Hopkins Depo. at 28.

> lost certain significant supporting factors in her knee that I would estimate contributed to her relatively good function, and that was stability and her residual menisci. But when you remove those two factors from her knee, I think it is reasonable to say that these two additional factors were the incident which changed the whole picture, took away her good function, even though she had some changes, and brought her to the point that she was relatively non-functional in many respects.
>
> Q. So is aggravation and acceleration, in your mind, the same thing as prevailing factor or are they something different?
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> A. I think that the fall aggravated her arthritic changes, and I think that the cruciate tear, the loss of stability and the loss of additional menisci were the things that brought her to the point that a knee replacement is going to be a requirement.[3]

Claimant had a history of prior left knee problems. In 2000, claimant underwent a left ACL reconstruction and partial meniscectomy. The initial ACL reconstruction failed and claimant had revision surgery the following year. Claimant testified she thereafter maintained an active lifestyle and even engaged in tae bo, which involved kicking, rocking back and forth on her legs, and lunges. Claimant testified that prior to her accident, she was in the best shape of her life, but admitted to minor arthritis, and aches and pains throughout her whole body, including to her back, knees and feet.

Claimant saw Melissa Kramer, P.A.-C, on August 5 and 18, 2011. Claimant testified these visits were to obtain hydrocodone, as well as a note to wear tennis shoes at work, mainly for her feet, but also because wearing tennis shoes would help her knees and back. The records from these visits document "chronic pain issues related to history of multiple knee surgeries and arthritis" and "chronic left knee pain."[4]

Dr. Hopkins opined claimant's injury resulted in more than just torn medial and lateral menisci; he testified claimant's injury caused her prior ACL graft to be disrupted or lacerated, causing knee instability.[5] Dr. Samuelson, while noting claimant's left ACL was deficient, did not think claimant had significant laxity. Dr. Samuelson opined that claimant's sensation that her knee was giving way was due to her arthritic changes. Dr. Jones noted claimant had no instability.

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[3] *Id.* at 57-58.

[4] P.H. Trans., Resp. Ex. B.

[5] Hopkins Depo. at 21-22, 29, 52-53.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b provides, in part:

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which claimant's right depends. In determining whether claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 provides, in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.
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> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is reviewable. Under K.S.A. 2011 Supp. 44-551 and K.S.A. 2011 Supp. 44-534a, the Board can review allegations that an administrative law judge exceeded his or her jurisdiction, including: (1) whether the worker sustained an accident, repetitive trauma or resulting injury; (2) whether the injury arose out of and in the course of employment; (3) whether the worker provided timely notice; and, (4) whether certain defenses apply. "Certain defenses" refer to defenses which go to the compensability of the injury under the Workers Compensation Act.[6]

ANALYSIS

(1) The Board Has Jurisdiction to Hear Claimant's Appeal.

Respondent is correct that the Board does not entertain appeals concerning a judge's order concerning medical treatment following a preliminary hearing. However, the underlying point of contention in this matter is whether claimant's accident was the prevailing factor in causing her injury, medical condition and disability.

Whether an accident occurred is appealable. The definition of "accident" mandates that the accident be the "prevailing factor" in causing the injury.[7] Whether an accident arose out of employment is appealable. An injury by accident arises out of employment only if the accident is the "prevailing factor" in causing the injury, medical condition and resulting disability or impairment.[8] The prevailing factor issue is a necessary component of "arising out of."[9]

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[6] See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 674, 994 P.2d 641 (1999).

[7] K.S.A. 2011 Supp. 44-508(d).

[8] K.S.A. 2011 Supp. 44-508(f)(2)(B)(ii).

[9] See *Shaffer v. Matcor Metal Fabrication, Inc.*, No. 1,058,166, 2012 WL 5461470 (Kan. WCAB Oct. 10, 2012), and *Berkley Frye v. Angmar Medical Holdings, Inc.*, Nos. 1,059,923 & 1,059,925, 2012 WL 6101123 (Kan. WCAB Nov. 30 2012).

The present issue is not whether the judge erred in failing to award medical treatment. Rather, the issue concerns whether claimant's accident was the prevailing factor in her medical condition, or at least her current need for medical treatment. This Board Member concludes that the claimant's arguments concerning prevailing factor present an appealable issue from a preliminary hearing order.

(2) Claimant's Accident Was Not the "Prevailing Factor" in Causing her Injury, Medical Condition and Disability.

This Board Member adopts Judge Belden's analysis, as set forth below:

> The Court first addresses the request for additional medical treatment. Respondent's liability for compensation under the Workers Compensation Act is limited to personal injuries by accident, repetitive trauma or occupational disease arising out of and in the course of employment. *See* K.S.A. 2011 Supp. 44-501b(b). To be compensable, an accident must be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift. K.S.A. 2011 Supp. 44-508(d). The accident must be the prevailing factor in causing the injury, and "prevailing factor" is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence. See K.S.A. 2011 Supp. 44-508(d), (g). An accidental injury is not compensable if work is a triggering factor or if the injury solely aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic. K.S.A. 2011 Supp. 44-508(f)(2). Furthermore, the accidental injury arises out of employment only if there is a causal connection between work and the accident, and if the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment. K.S.A. 2011 Supp. 44-508(f)(2)(B).
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> In this case, Dr. Jones, the treating orthopedist, and Dr. Samuelson, the Court-ordered evaluating orthopedist, opined the work-related accident was the primary factor, compared to all other factors, in producing at most a meniscal injury that was adequately treated by Dr. Jones. Neither physician believed the work-related accident was the primary factor in the development of the arthritic condition that requires additional medical treatment. Dr. Hopkins believed the work-related accident was the prevailing factor in aggravating Claimant's arthritis, a retearing of the menisci and producing an ACL-deficient knee, but this opinion is based on an incorrect definition of "prevailing factor" and an inaccurate understanding of Claimant's prior symptoms that was contradicted by Claimant and her prior treatment records. The Court finds the opinions of Dr. Jones and Dr. Samuelson more credible and finds the work-related accident was the prevailing factor in producing tears of the medial and lateral menisci of the left knee for which Claimant has reached maximum medical improvement. The work-related accident is not the prevailing factor in the development of arthritis in the left knee or an ACL deficiency, which are the medical conditions for which additional treatment is indicated. Because Respondent is not obligated to provide medical treatment for non-compensable medical conditions, the request for additional medical treatment is denied.

In support of the request for additional medical treatment, Claimant argues the Court should find the Missouri Workers' Compensation Law and Missouri case law persuasive. In particular, Claimant cites *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511 (Mo. App. W.D. 2011). In *Tillotson*, the Court noted the medical treatment at issue would cure or relieve the compensable injury, as well as the preexisting condition. 347 S.W.3d at 521. In this case, however, both Dr. Jones and Dr. Samuelson believed no additional treatment for the compensable injury was required. Thus, this matter is distinguishable from *Tillotson*. Moreover, subsequent Missouri cases have noted Tillotson addresses liability for medical treatment for compensable injuries, and not whether a compensable injury has occurred. *See Armstrong v. Tetra Park, Inc.*, 391 S.W.3d 466 (Mo. App. S.D. 2012); *see also Jordan v. USF Holland Motor Freight, Inc.*, 383 S.W.3d 93 (Mo. App. S.D. 2012). In like token, the Court finds Claimant's argument from *Cade v. Durham School Services*, Docket No. 1,047,387 (W.C.A.B. Jan. 28, 2013), that one takes an employee as one finds him as inapplicable to this case because Cade involves the Workers Compensation Act as it existed before May 2011.

Because the request for additional medical treatment was denied, the request for prospective temporary total disability compensation is also denied. In addition, it is not appropriate to award temporary total disability compensation based purely on speculation.

Finally, the Court addresses the request for an hourly attorney's fee for services provided in these preliminary proceedings. The Kansas Workers Compensation Act provides four circumstances for awarding attorney's fees to an employee's attorney: (1) enforcement of an award under K.S.A. 44-512a(b); (2) sanction for frivolous filing under K.S.A. 44-536a(d); (3) an hourly award for post-award proceedings under K.S.A. 2011 Supp. 44-536(g); and (4) 25% of the compensation recovered or a reasonable sum, whichever is less, determined at the conclusion of the initial or original proceedings under K.S.A. 2011 Supp. 44-536(a). This matter does not involve enforcement, a frivolous filing or post-award proceedings, so the first three circumstances do not apply. An attorney fee cannot be awarded under the fourth circumstance because an hourly fee must be compared against 25% of the compensation recovered, which is not known. The request for attorney's fees is denied.

In conclusion, the Court finds Claimant's compensable injuries to the left knee entail medial and lateral meniscus tears for which Claimant has reached maximum medical improvement. The request for additional medical treatment is denied. The request for prospective temporary total disability compensation is denied. The request for attorney's fees is denied. Unauthorized medical of up to $500.00 is to be paid by Respondent to Claimant and her attorney, less any unauthorized medical previously paid by Respondent.[10]

[10] Judge Belden's preliminary hearing Order (April 30, 2013) at 3-5.

CONCLUSIONS

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member affirms Judge Belden's ruling.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

DECISION

WHEREFORE, the undersigned Board Member affirms Administrative Law Judge William G. Belden's April 30, 2013 preliminary hearing Order.

IT IS SO ORDERED.

Dated this _____ day of June, 2013.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

c: Daniel L. Doyle
d.doyle@swrllp.com
m.toplikar@swrllp.com

Nathan D. Burghart
nburghart@fairchildandbuck.com
swohlford@fairchildandbuck.com

Honorable William G. Belden

[11] K.S.A. 44-534a.